EX SERGEANT T MAJOR JAMBWA
and
SERGEANT KASAWAYA
and
CONSTABLE MUTANHAU
and
CONSTABLE SANDE
versus
THE COMMISSIONER GENERAL OF THE POLICE
and
THE TRIAL OFFICER SUPERINTENDENT CHINYAMA N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 24 March 2022 & 7 October, 2022

Opposed

Mr A. Mugiya, for the applicant
Mr I. Salanje, for the respondents

MANGOTA J

I heard this application on 24 March, 2022. I delivered an *ex tempore* judgment in which I granted the application as prayed in the draft order.

On 26 July, 2022 the respondents both of whom are members of the police force wrote to the registrar of this court. They requested that I furnish them with full reasons for my decision. These are they:

The first applicant is a retired member of the Zimbabwe Republic Police. The remaining applicants are all serving members of the organization. All four of them appeared before the second respondent, the trial officer, facing the charge of contravening para 34 as read with para 11 of the Schedule to the Police Act [*Chapter 11.10*]. They pleaded not guilty to the charge and raised an exception. The exception was to the effect that the charge, as framed, did not disclose an offence. They argued, in pursuance of the exception, that the two circulars under which they were charged

were not applicable to the case which the State placed before the second respondent. They submitted that, whilst the circulars referred to police officers who were/are on duty, they were arrested after they had completed their duty for the day.

After hearing them and the State on the issue which related to the exception, the second respondent dismissed the same. The dismissal of the exception gave birth to the present application. They applied under Rule 62(1) of the rules of court as read with section 27 of the High Court Act to review the decision of the second respondent. They allege, in their grounds for review, that:

a) the second respondent failed to apply his mind to the exception which they raised making his decision not only irregular but also wrong and irrational in its defiance of logic –and
b) the second respondent omitted to include the submissions which they made in determining the validity or otherwise of the exception and, in the process, he showed bias against them.

The applicants placed their application into its correct context. Rule 62(1) of the High Court Rules, 2021 is relevant. It reads:

> "….any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial or quasi-judicial or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected".

The rule, it is needless to mention, walks hand-in-glove with sections 26 and 27 of the High Court Act ('the Act"). Section 26 of the Act confers power or authority upon me to review decisions and/or proceedings of all inferior courts, tribunals and administrative authorities. Section 27(1) of the same spells out the grounds on the basis of which I am able to review decisions and/proceedings of the mentioned bodies. These comprise:

i) absence of jurisdiction on the part of the court, tribunal or authority concerned;
ii) interest in the cause, bias, malice or corruption on the part of the presiding officer;
iii) gross irregularity in the proceedings or decision.

The ground which the applicants advance is that of bias on the part of the second respondent as against them. For them to succeed they must allege and prove, on a preponderance of probabilities, that the second respondent was biased against them. Bias per se is not a matter of law. It is matter of fact. It should be evident on the face of the court *a quo*'s record.

The question which begs the answer is why the Legislature pass a law which allows the court to review proceedings and decisions of inferior courts, tribunals and/or administrative bodies. The answer to the question posed is simple. The purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected: *Magugu* v *Police Service Commission & Anor, 2010 (2) ZLR 185 (H*). The intention of the Legislature in enacting sections 26 – 29 of the High Court Act is clear. The tribunal or officer, the sections stress, must as nearly as possible comply with the rules of procedure and evidence as is done in the country's courts. Where the tribunal or trial officer significantly departs from the procedure set out in criminal proceedings in the courts of Zimbabwe, the proceedings may be set aside on review. The test applied on reviewing proceedings is whether or not the proceedings are in accordance with real and substantial justice: *Chillufiya* v *Commissioner-General of Police & Others, HH 89/10.*

Whether or not real and substantial justice prevails in the case of the applicants depends on what the second respondent did as measured against the exception which the applicants mounted. The issue, in short, centers on the manner in which the second respondent applied the principles of the law of practice and procedure to the case which had been placed before him. The law of practice and procedure provides that a judicial officer should always maintain a balanced, sound and somber approach to matters which parties place before him for his consideration. The law enjoins him not to allow himself to fall into the trap of descending into the arena. It encourages him to stay clear of the legal battle of the parties who are before him. It tells him that he will be seriously misunderstood by the one or the other of the parties whose case he is determining if he allows himself to be clouded with the dust of the litigants' war. He will, under the stated circumstances, fall victim to the unnecessary allegation that he was/ is biased.

MCNALLY JA spoke eloquently on the meaning and import of the principle of non-involvement of the judicial officer in the battle of the litigants who are before him. He did so in *Blue Ribbon Foods Ltd* v *Dube NO & Anor, 1993 (2) ZLR 146 (H)* at 148 wherein he stated that:

> "when the arbiter makes common cause with one of the parties….any *facase* of justice is shattered; the arbiter is seen to have descended into the arena with the possible consequential blurring of his vision by the dust of the battle…he deprives himself of the advantage of calm and dispassionate observation".

It is in the letter and spirit of Rule 62(1) of the rules of court that the applicants served the application upon the first and second respondents. The second respondent, as the trial officer,

occupied the position of a quasi-judicial officer. He, therefore, had to be served with the application.

As a judicial officer who dealt with the exception of the applicants, the second respondent misdirected himself when he, on receipt of the application, filed a notice of opposition to the same. He unwittingly descended into the arena to a point where he cannot escape the bias which the applicants are alleging against him in this application. The best course of action which he should have adopted when he received the application in his capacity as the trial officer was not to file a notice of opposition as he did. His choice as the arbitrator or umpire who had been served with the notice of application for review of his proceedings and/or decision was to take no action and to abide by the decision of the reviewing court. Alternatively, he should have set out facts which he considered would be of assistance to the court and end there. Alternatively he should have requested a representative of the first respondent to file the opposing affidavit rather than file an affidavit where he clearly defends his work and, in the process, supports one side. What he did opened him to serious challenge by the applicants. They left no stone unturned in their effort to show me that he maintained a biased disposition towards them during the course of their trial.

The trap which the second respondent created for himself when he opposed the application for review coupled with the summary dismissal of the applicants' exception gave to the latter their judgment on a platter, so to speak. The ruling which he made in three sentences betrays his lack of appreciation of what the parties who appeared before him had placed before him for his consideration. Reference is made in the mentioned regard to the ruling which appears at page 38 of the record. Its brevity showed to all and sundry that the second respondent did not furnish reasons for his findings in the form of a reasoned judgment. He, in the process, placed me into an invidious position. He disenabled me to apply the test of whether or not the proceedings which he conducted were in accordance with real and substantial justice.

The applicants proved their case on a balance of probabilities. The application is, in the result, granted as prayed in the draft order.

Mugiya and Muvhami Law Chambers, appellant's legal practitioners
Civil Division of the AG'S Office, respondent's legal practitioners